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October 11, 2006

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

Ms. Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: WC Docket No. 04-223: In the Matter of Petition of Qwest Corporation for
Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan
Statistical Area

Dear Ms. Dortch:

Broadview Networks, Inc., Covad Communications Group, NuVox Communications, Inc. and XO Communications, Inc. (the "CLEC Parties"), through counsel, hereby submit for filing the above-captioned proceeding their Motion to Modify Protective Order, and four (4) copies of the same. In accordance with 47 C.F.R. § 1.727, enclosed please also find a copy of the CLEC Parties' Proposed Order, on computer disk.

Please feel free to contact the undersigned counsel at (202) 342-8625 if you have any questions regarding this filing.

Respectfully submitted,

Brett Heather Freedson

Brett Heather Freedson

cc: Jeremy Miller, Wireline Competition Bureau
Tim Stelzig, Wireline Competition Bureau
Marcus Maher, Wireline Competition Bureau

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CERTIFICATE OF SERVICE

I, Brett Heather Freedson, hereby certify that true and correct copies of the foregoing Motion to Modify Protective Order, in WC Docket No. 04-223, were delivered by hand, and via email, this 11th day of October 2006, to the individuals on the following list:

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Brett Heather Freedson

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

| | | |
|---|---|----------------------|
| In the Matter of |) | |
| |) | |
| Petition of Qwest Corporation for Forbearance |) | WC Docket No. 04-223 |
| Pursuant to 47 U.S.C. § 160(c) in the Omaha |) | |
| Metropolitan Statistical Area |) | |

MOTION TO MODIFY PROTECTIVE ORDER

Broadview Networks, Inc., Covad Communications Group, NuVox Communications, Inc., and XO Communications, Inc. (the "CLEC Parties"), through counsel and pursuant to 47 C.F.R. § 1.727, hereby respectfully request that the Federal Communications Commission (the "Commission") modify the Protective Order issued in the above-captioned proceeding,¹ as necessary to permit the use of confidential information by authorized parties, for purposes of analyzing and responding to forbearance petitions, under 47 U.S.C. § 160, including the Petitions of the Verizon Telephone Companies² and the Petition of ACS.³ The relief requested by the CLEC Parties would

¹ *In the Matter of the Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Protective Order, DA 04-1870 ("Qwest Protective Order").

² See Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Boston Metropolitan Statistical Area; Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the New York Metropolitan Statistical Area; Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Philadelphia Metropolitan Statistical Area; Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Pittsburgh Metropolitan Statistical Area; Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Providence Metropolitan Statistical Area; Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Virginia Beach Metropolitan Statistical Area (filed Sept. 6, 2006) (together, the "Verizon Petitions"), WC Docket No. 06-172, consolidated.

³ See Amended Petition of ACS of Anchorage, Inc., Pursuant to Section 10 of the Communications Act of 1934, as Amended, For Forbearance from Sections 251(c)(3) and

further inform the comments of all interested parties on such forbearance requests, and would permit interested parties to more fully respond to the claims of petitioners seeking forbearance relief. Interested parties would be foreclosed from participating fully in any forbearance proceedings where the petitioning party has based its request for relief on the precedent established in the *Qwest Omaha Order* if such interested parties are precluded from using the confidential data relied upon in that order. For the reasons set forth herein, the Commission should modify the existing limitation in the Qwest Protective Order on the use of confidential information to permit such information to be employed for purposes related to the conduct of other forbearance proceedings, and any judicial proceedings arising there from.⁴

DISCUSSION

On December 2, 2005, the Commission released its Memorandum Opinion and Order in the above-captioned proceeding, granting to Qwest Corporation (“Qwest”) certain of the forbearance relief requested by its Petition within the Omaha, Nebraska Metropolitan Statistical Area (“MSA”).⁵ Importantly, the *Qwest Omaha Order* sets forth the Commission’s detailed analysis of the statutory forbearance requirements, and applies Section 10 of the Act to the market-

252(d)(1) in the Anchorage LEC Study Area (filed Oct. 6, 2005) (“ACS Petition”), WC Docket No. 05-281.

⁴ Specifically, the CLEC Parties request that the Commission modify ¶ 7 of the Qwest Protective Order as follows: “Persons obtaining access to stamped confidential documents under this order may use the information only in the conduct of this proceeding and any judicial proceeding arising there from, and in the conduct of any other Commission forbearance proceeding brought under Section 10 of the Act and any judicial proceeding arising there from, and shall not use such information for any other purpose, including business, governmental, commercial, or other administrative or judicial proceedings.”

⁵ *In the Matter of the Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, FCC 05-170 (rel. Dec. 2, 2005) (“*Qwest Omaha Order*”). Specifically, in this proceeding, the Commission granted to Qwest forbearance relief, within nine wire centers, from Section 251 unbundling obligations, and within the entire Omaha MSA, from certain dominant carrier regulations, including price cap, rate of return, 15-day tariffing and 60-day discontinuance regulations.

specific facts presented in the Qwest Petition. The confidential information supporting the Commission's forbearance determinations, however, is largely redacted from the *Qwest Omaha Order*, and therefore is not subject to public inspection. Moreover, even to the extent that interested parties may obtain, subject to the terms and conditions of the Qwest Protective Order, full disclosure of the *Qwest Omaha Order*, the Qwest Protective Order expressly precludes use of confidential information in other proceedings before the Commission.⁶

The Commission's current treatment of the *Qwest Omaha Order* significantly impairs the ability of the CLEC Parties, and other interested parties, to fully review, analyze and respond to the market-specific data submitted in the Verizon Petitions and the ACS Petition. Specifically, under the Qwest Protective Order, the CLEC Parties are unable to rely on the market definitions and local competition benchmarks utilized by the Commission in the *Qwest Omaha Order* to determine whether the forbearance relief requested by Verizon is warranted within a particular MSA. Without access to the confidential information relied on by the Commission in the *Qwest Omaha Order*, the CLEC Parties cannot properly assess whether the market-specific data submitted in the Verizon Petitions or the ACS Petition in fact satisfies the statutory forbearance requirements. At bottom, the Qwest Protective Order, without modification, serves as a substantial impediment to parties wishing to comment on other petitions before the Commission requesting forbearance relief.

CONCLUSION

For the reasons set forth herein, the Commission should grant this Motion, and should modify the Protective Order in the above-captioned proceeding, as necessary to permit the use of confidential information by authorized parties, for purposes of analyzing and responding to

⁶ Qwest Protective Order ¶ 7.

other forbearance petitions, under 47 U.S.C. § 160, including the Verizon Petitions and the ACS Petition.

Respectfully submitted,

A handwritten signature in cursive script, reading "Genevieve Morelli".

Brad E. Mutschelknaus

Genevieve Morelli

Thomas Cohen

KELLEY DRYE & WARREN LLP

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Counsel to the CLEC Parties

Dated: October 11, 2006

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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|---|---|----------------------|
| In the Matter of |) | |
| |) | |
| Petition of Qwest Corporation for Forbearance |) | WC Docket No. 04-223 |
| Pursuant to 47 U.S.C. § 160(c) in the Omaha |) | |
| Metropolitan Statistical Area |) | |

PROPOSED ORDER

Adopted:

Released:

1. On October 11, 2006, Broadview Networks, Inc., Covad Communications Group, NuVox Communications, Inc., and XO Communications, Inc. (the "CLEC Parties"), through counsel and pursuant to 47 C.F.R. § 1.727, requested that the Federal Communications Commission (the "Commission") modify the Protective Order issued in the above-captioned proceeding,¹ as necessary to permit the use of confidential information by authorized parties, for purposes of analyzing and responding to other forbearance petitions, under 47 U.S.C. § 160, including the Petitions of the Verizon Telephone Companies² and the Petition of ACS of Anchorage, Inc.³

2. For the reasons set forth in the CLEC Parties' Motion to Modify Protective Order, the relief requested by the CLEC Parties is hereby granted, and ¶ 7 of the Qwest Protective Order is modified as follows: "Persons obtaining access to stamped confidential documents under this order may use the information only in the conduct of this

¹ *In the Matter of the Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Protective Order, DA 04-1870 ("Qwest Protective Order").

² See Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Boston Metropolitan Statistical Area; Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the New York Metropolitan Statistical Area; Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Philadelphia Metropolitan Statistical Area; Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Pittsburgh Metropolitan Statistical Area; Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Providence Metropolitan Statistical Area; Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Virginia Beach Metropolitan Statistical Area (filed Sept. 6, 2006) (together, the "Verizon Petitions"), WC Docket No. 06-172, consolidated.

³ See Petition of ACS of Anchorage, Inc., Pursuant to Section 10 of the Communications Act of 1934, as Amended, For Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage LEC Study Area (filed Oct. 6, 2005) ("ACS Petition"), WC Docket No. 05-281.

proceeding and any judicial proceeding arising there from, and in the conduct of any other Commission forbearance proceeding brought under Section 10 of the Act and any judicial proceeding arising there from, and shall not use such information for any other purpose, including business, governmental, commercial, or other administrative or judicial proceedings.”

FINDINGS OF FACT

3. On December 2, 2005, the Commission released its Memorandum Opinion and Order in the above-captioned proceeding, granting to Qwest Corporation (“Qwest”) certain of the forbearance relief requested by its Petition within the Omaha, Nebraska Metropolitan Statistical Area (“MSA”).⁴

4. The *Qwest Omaha Order* redacts all confidential information supporting the Commission’s forbearance determinations, and accordingly, such confidential information is not subject to public inspection.

5. The interested parties to this proceeding may obtain, upon request, and pursuant to the terms and conditions of the Qwest Protective Order, a complete copy of the *Qwest Omaha Order*, including all confidential information set forth therein;⁵ provided, however, that such confidential information may not be used, for any purpose, in any other proceeding before the Commission.⁶

CONCLUSIONS OF LAW

6. The Qwest Protective Order currently prohibits use by authorized parties of any confidential information submitted in that proceeding for purposes of analyzing any other forbearance petitions, under 47 U.S.C. § 160, including the Verizon Petitions and the ACS Petition.

7. The Commission’s current treatment of the *Qwest Omaha Order*, and the confidential information submitted in that proceeding, significantly impairs the ability of interested parties to fully review and analyze the market-specific data submitted in other forbearance proceedings before Commission, pursuant to 47 U.S.C. § 160, including WC Docket No. 06-172 and WC Docket No. 05-281.

8. Accordingly, it is ORDERED that the Qwest Protective Order be modified, as necessary to permit the use of confidential information by authorized parties, for purposes of

⁴ *In the Matter of the Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, FCC 05-170 (rel. Dec. 2, 2005) (“*Qwest Omaha Order*”). Specifically, in this proceeding, the Commission granted to Qwest forbearance relief, within nine wire centers, from Section 251 unbundling obligations, and within the entire Omaha MSA, from certain dominant carrier regulations, including price cap, rate of return, 15-day tariffing and 60-day discontinuance regulations.

⁵ Qwest Protective Order ¶ 4.

⁶ *Id.* ¶ 7.

analyzing and responding to other forbearance petitions, under 47 U.S.C. § 160, including the Verizon Petitions and the ACS Petition. Paragraph 7 of the Qwest Protective Order hereby is modified as follows: "Persons obtaining access to stamped confidential documents under this order may use the information only in the conduct of this proceeding and any judicial proceeding arising there from, and in the conduct of any *other Commission forbearance proceeding brought under Section 10 of the Act* and any judicial proceeding arising there from, and shall not use such information for any other purpose, including business, governmental, commercial, or other administrative or judicial proceedings."

FEDERAL COMMUNICATIONS COMMISSION

DOCKET NO. 04-223

Attachment A

DOCUMENT OFF-LINE

This page has been substituted for one of the following:

- o This document is confidential (**NOT FOR PUBLIC INSPECTION**)
- o An oversize page or document (such as a map) which was too large to be scanned into the ECFS system.
- o Microfilm, microform, certain photographs or videotape.
- o Other materials which, for one reason or another, could not be scanned into the ECFS system.

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